IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

WENDY EDWARDS,
Petitioner/Appellee,

v.

PETER FRANCIS TOLHURST,
Respondent/Appellant.

No. 2 CA-CV 2014-0126
Filed January 23, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. SP20111404
The Honorable Sean E. Brearcliffe, Judge

VACATED AND REMANDED

COUNSEL

Robert L. Barrasso, Tucson
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Vásquez and Judge Howard concurred.

K E L L Y, Presiding Judge:

¶1 Peter Tolhurst appeals from the trial court's order granting Wendy Edwards's petition to relocate their minor child, A.T., to Texas and denying his petition to prevent the relocation. For the following reasons, we vacate the trial court's order, and remand for a new trial.

Factual and Procedural Background

¶2 A.T. was born in 2006 to Peter and Wendy, who never were married. In May 2012, the parties signed a Memorandum of Understanding Child Care Plan, in which they agreed to share joint legal custody of A.T. In May 2014, Peter filed a petition to prevent Wendy from relocating A.T., and Wendy filed a response and her own petition to allow her to relocate A.T. to the Dallas area. Following a trial, at which both Wendy and Peter testified, the court granted Wendy's petition to relocate and denied Peter's petition to prevent relocation. Peter filed a motion for reconsideration, which the court denied. This appeal followed.[1]

Discussion

¶3 Peter argues the trial court's ruling was "arbitrary and an abuse of [its] discretion" because Wendy did not meet her burden

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[1]Wendy did not file an answering brief. Although the failure to file an answering brief may constitute a confession of error, we exercise our discretion to address the merits of Peter's arguments "because a child's best interests are involved." *See In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 2, 38 P.3d 1189, 1190 (App. 2002).

to show that relocating A.T. was in A.T'.s best interests.[2] We review a court's decision to grant a motion to relocate for an abuse of discretion, considering the evidence in the light most favorable to upholding the decision. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 19, 219 P.3d 258, 262 (App. 2009). "'An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision,'" *id.*, *quoting State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 14, 66 P.3d 70, 73 (App. 2003), or when "'there has been an error of law committed in the process of reaching [a] discretionary conclusion,'" *id.*, *quoting Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982) (alteration in *Hurd*).

¶4 Section 25-408(F), A.R.S., provides that, in deciding a petition to relocate, "[t]he court shall determine whether to allow the parent to relocate the child in accordance with the child's best interests." The burden is on the parent wishing to relocate to prove what is in the child's best interests. *Id.* The court must consider the general best-interest factors enumerated in A.R.S. § 25-403, as well as seven best-interest factors specifically related to relocation. § 25-408(H). The court must "'make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.'" *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 9, 79 P.3d 667, 670 (App. 2003), *quoting* § 25-403(J).[3]

¶5 Peter argues "[t]he only reason that the court allowed the move was because the court somehow felt that if the child

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[2]Peter asks us to consider "scientific evidence" that was not presented at the trial. However, we will not consider evidence not presented to the trial court. *See Reeck v. Mendoza*, 232 Ariz. 299, ¶ 13, 304 P.3d 1122, 1125 (App. 2013), *citing Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 86-87, 912 P.2d 1309, 1315-16 (App. 1995) (court of appeals cannot consider issues, theories, and evidence not presented to superior court).

[3]Section 25-403(J), A.R.S., was renumbered as § 25-403(B). 2005 Ariz. Sess. Laws, ch. 45, § 3. The language of the statute did not change.

moved with mother and then mother got married 8 months later, that the child would be part of a 'whole family.'" He asserts that the trial court's ruling "stands for the simple proposition that if either parent involved in a parenting time relocation case plans on getting married, that parent will prevail."

¶6 At trial, Wendy testified that she wanted to move to the Dallas area because she was getting married in April 2015 to a man who lives there. She also testified that one of her other daughters suffers from major depressive disorder, and she would be able to secure better services for that daughter in Texas. In addition, Wendy testified that her mother was willing to move from England to Texas and that her fiancé had family in Texas, so she would "have an increased support system," which would be "better for [A.T.]." Wendy also testified that the schools in Plano are better than the schools in Arizona.

¶7 Although the trial court considered each statutory factor, it made clear in its ruling that the dispositive point was that A.T. would be part of a "whole family" if Wendy relocated her to Texas. The court found, in considering "[t]he prospective advantage of the move for improving the general quality of life for the custodial parent or for the child," *see* § 25-408(H)(3), that A.T.'s "life would change" because she "will be able to become a member of a new family, one made up of her mother and new husband and sisters." The court further stated that "[i]t does not appear . . . that [A.T.] will ever be a member of a whole family if she remains here in Tucson" and that "[t]here is a substantial advantage to [A.T.] to be part of a whole family unit if she moves to Texas." And, with respect to the "potential effect of relocation on the child's stability," *see* § 25-408(H)(8), the court found that "[i]n the long run, the stability of [A.T.] is fostered by being a part of a whole family, living under one roof."

¶8 The trial court also found that Wendy's life "will improve" because "[s]he will be able to marry and live with her new husband, and form a new family." With respect to Wendy's proposed parenting time schedule, which it described as "the most difficult problem to overcome," it found that although the schedule would "give [Peter] substantial time with [A.T.], it is not regular,"

but is "spread out" and would require A.T. to spend significant amounts of Peter's summer parenting time in day care. The court further found that "[l]eaving her father would no doubt affect [A.T.'s] development," as would "[m]oving with her mother to a new family environment," but stated "[t]he negative effect of the former, might be offset somewhat by the positive effect of the latter." The court discounted Wendy's testimony that she could secure better services for her other daughter in Texas, and apparently did not consider Wendy's testimony that her mother would move to Texas, that her fiancé had family there, or that the schools are better in Plano.

¶9 None of the trial court's other findings strongly favored relocation. The court concluded that each parent had developed a good relationship with A.T. and that her adjustment to home, school, and community appeared normal. It characterized A.T., at seven-and-a-half years of age, as too young to have meaningful input into the relocation decision, and described the mental and physical health of all individuals involved as normal. And it noted there had been no evidence presented that either parent would deny the other reasonable parenting time. The court found that Wendy's petition and Peter's opposition were made in good faith and that the parties' petitions "appear to be motivated by love for [A.T.]."

¶10 We have found no published Arizona case in which a court considered a child becoming part of a "whole family" as a factor in deciding a petition to relocate. Moreover, the legislature expressed no policy in the legal decision-making and parenting time statutes favoring a situation that includes a husband and wife living together with children who are unrelated to one spouse. *See* A.R.S. §§ 25-401 through 25-415. No evidence was presented at trial regarding the benefit of a child living in a "whole family," and the court could not take judicial notice of any such claim. *See Higgins v. Higgins*, 194 Ariz. 266, ¶ 21, 981 P.2d 134, 139 (App. 1999). Like the trial court's finding in *Higgins* that the mother's adultery and cohabitation had a "'very serious and harmful detrimental effect upon the children,'" *id.* ¶ 19, the finding that A.T. would benefit from being part of a "whole family" is "not one for which the answer is so generally known or accurately and readily determined

that it can be proved by judicial notice," *id.* ¶ 21. Accordingly, we conclude the trial court abused its discretion by basing its decision to grant the petition to relocate on its assumption that a move to Texas was in A.T.'s best interests because she would become part of a "whole family."

Disposition

¶11 For the foregoing reasons, we vacate the trial court's order granting Wendy's petition to relocate and denying Peter's petition to prevent the relocation, and remand for a new trial under the correct legal standard.